No. 16054

In the United States Court of Appeals for the Ninth Circuit

Nicodemus, appellant

v.

Washington Water Power Company, appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF IDAHO, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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INDEX

CITATIONS

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OPINION

The district court did not write an opinion.

JURISDICTION

This is an appeal filed March 6, 1958, from an order awarding possession after determination of just compensation in a condemnation case. A motion for new trial was denied on February 7, 1958. The jurisdiction of the district court was invoked under 25 U. S. C. sec. 357, as construed in *Minnesota* v. *United States*, 305 U. S. 382 (1939). The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether Congress has constitutional power to authorize the condemnation of land allotted to an Indian.

STATUTE INVOLVED

Section 3 of the Act of March 3, 1901, 31 Stat. 1084, 25 U. S. C. sec. 357, provides, in part, as follows:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

STATEMENT

This proceeding was instituted by the Washington Water Power Company in June 1957 to condemn an easement for a transmission line over a designated 40-acre tract of land in Idaho. The tract constitutes lands of Julia Nicodemus, a restricted Coeur d'Alene Indian. The United States filed notice of appearance while the Indian by answer denied authority to condemn.[1] The authority was upheld and, pursuant to Rule 71A (k) and Idaho law compensation was determined by commissioners, the amount awarded was paid into court, and possession was awarded to the company. Objection to the taking was reiterated by motion for a new trial which was denied on February 7, 1958, and this appeal followed.

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[1] The Company moved to strike appellant's answer on the theory that under 25 U. S. C. sec. 175 only the United States Attorney could represent the Indians. We assume that contention will not be urged here since the statute is plainly permissive, not mandatory. *Siniscal* v. *United States*. 208 F. 2d 406 (C. A. 9, 1953).

ARGUMENT

Condemnation of appellant's land was properly authorized by Congress

In the last few years Indian Tribes have on several occasions contested the condemnation of their lands either for various federal projects or for projects of licensees under the Federal Power Act. These attacks have failed with one possible exception. *Seneca Nation of Indians* v. *Brucker,* C. A. D. C., November 18, 1958,[2] affirming 162 F. Supp. 580; *Tuscarora Nation of Indians* v. *Power Authority of the State of New York,* 257 F. 2d 885 (C. A. 2, 1958), cert. den. October 13, 1958, No. 384; *United States* v. *5,667.94 Acres of Land, Etc.,* 152 F. Supp. 861 (D. Mont. 1957); *United States* v. *21,250 Acres of Land,* 161 F. Supp. 376 (W. D. N. Y. 1957). The one exception was a case where condemnation proceedings were dismissed and appeal was taken. Pending appeal Congress settled the matter and the judgment was vacated and the case dismissed as moot. *United States* v. *Sioux Indians of Standing Rock Reservation,* 259 F. 2d 271 (C. A. 8, 1958). All of these cases recognized the well settled power of Congress, in connection with the administration of Indian Affairs, to authorize the condemnation of tribal or allotted lands regardless of the treaty provision that might otherwise be applicable. See *Cherokee Nation* v. *Southern Kansas Railway Co.,* 135 U. S. 641, 657 (1890); *Henkel* v. *United States,* 237 U. S. 43 (1915). Specifically, as to section 3 of the 1901 Act here involved, the court in *Minnesota* v. *United States,* 305

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[2] Copies of this unreported opinion are submitted herewith.

U. S. 382 (1939) held that allotted lands could be condemned by the State in federal court upon joinder of the United States. The result is the same whether the United States holds the fee title in trust for the allottee or the allottee has title subject to restraints on alienation, footnote 1, 305 U. S. at p. 386. There can thus be no question of the validity of the 1901 Act.

Appellants attempt to invoke *United States* v. *Forty-three Gallons of Whiskey,* 108 U. S. 491 (1883); *Elk* v. *Williams,* 112 U. S. 94, 100 (1884) and similar cases (Br. 4–6). It was decisions such as these upon which the Indian Tribes relied in the cases cited above to support their argument that legislation under which the condemnation of lands of private persons was authorized was not sufficient to authorize the taking of Indian tribal lands. It was the position of the United States that no special form was necessary to authorize acquisition of Indian lands but that such lands, tribal or allotted, were subject to the same principles as all other lands. But even if, for purposes of argument only, it is assumed that there is some special rule of construction applicable to Indian statutes, the 1901 Act is perfectly plain and unambiguous. There is no possible construction which would exempt appellant's lands from condemnation. "Though statutes terminating Indian property rights should be construed narrowly, we cannot ignore the intention of Congress where it is perfectly plain." *United States ex rel. the Shoshone Indian Tribe* v. *Seaton,* 248 F. 2d 154, 155 (C. A. D. C. 1957), cert. den. 355 U. S. 923.

Appellants apparently argue (Br. 7–8) that the United States is an express trustee and as their guard-

ian could authorize condemnation only upon a showing that it is in their best interests. But, since Congress has spoken so explicitly, there is no occasion to discuss whether or not the 1901 Act was for the best interests of allottees. It should be noted, however, that while the relationship of the United States with the Indians has been said to resemble that of guardian and ward, "It is clear that this relationship does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships." *Federal Indian Law,* Department of Interior, 1958, p. 557; *Sioux Tribe of Indians* v. *United States,* 146 F. Supp. 229, 237–238 (C. Cls. 1956).

CONCLUSION

It is submitted that the judgment below should be affirmed.

Respectfully submitted.

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